STATE OF MICHIGAN

COURT OF APPEALS

PATRICK C. HALL and AVA ORTNER,

Plaintiffs-Appellants,

v

STARK REAGAN, P.C., JOSEPH A. AHERN, PETER L. ARVANT, KENNETH M. BOYER, JEFFREY J. FLEURY, WILLIAM D. GIRARDOT, CHRISTOPHER E. LeVASSEUR, R. KEITH STARK, and MICHAEL H. WHITING,

Defendants-Appellees.

FOR PUBLICATION
September 13, 2011

No. 294647
Oakland Circuit Court
LC No. 2009-099833-CD

Advance Sheets Version

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

K. F. KELLY, P.J. (*dissenting*).

I respectfully dissent. The circuit court properly granted defendants summary disposition pursuant to MCR 2.116(C)(7) and properly ordered the case to proceed to arbitration. I would affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

As noted by the majority, the individual parties to this appeal are present and former shareholders in the law firm of defendant Stark Reagan, P.C. (the firm). Plaintiffs Patrick C. Hall and Ava Ortner first became "of counsel" to the firm in 2003 for a one year trial period to determine if they would become full partners[1] in the firm. At the time, any future participation in the firm was contingent on them becoming full partners. The firm only had full partners, and each partner had equal shares of stock, along with a seat on the Board of Directors.

Plaintiffs became full partners of the firm in 2004, each paying $10,000 in a capital contribution to the firm and signing the 1991 Shareholders' Agreement. In 2005, a new

[1] The shareholders in Stark Reagan referred to each other as "partners" and I use the term here.

Shareholders' Agreement was executed. A particular purpose of the agreement was to ensure effective management of the firm:

> B. The parties hereto believe it is desirable and in their mutual best interest to control the ownership of the Stock of the Corporation and to also *insure the continuous, harmonious and effective management of the affairs, policies, and operations* of the Corporation . . . .
>
> C. The parties desire to enter into this Agreement in order, among other things, to *establish and implement a structure for the orderly management and operation of the Corporation*, to restrict the transfer of all shares of the Stock of the Corporation so that the Stock will not pass into the control of persons whose interests might be incompatible with the interests of the Corporation and the Shareholders, and to provide a market for the sale of shares upon death or disability of a Shareholder and upon the occurrence of certain other events; all as hereinafter provided. [Emphasis added.]

Stock ownership of the firm was divided equally among the partners. All shares were common shares and retained the same voting rights. Each partner served as an officer of the firm; during their five-year tenure with the firm, plaintiffs both held the position of vice president. The managing partner of the firm was elected each year by a vote of the partners. The agreement specifically stated that it was subject to and governed by the laws of the state of Michigan.

In addition to providing for management of the firm by its shareholders, the agreement specified the procedures and requirements for the involuntary termination of a partner's interest in the firm as well as the process by which the shares could be redeemed. And any dispute was to be submitted to arbitration:

> 14.1 *Arbitration*
>
> Any dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder shall be resolved by binding arbitration according to the rules of the American Arbitration Association in the County of Oakland, State of Michigan. The parties hereby irrevocably submit to personal jurisdiction of any State court in the County of Oakland or the Federal court in the County of Wayne, State of Michigan, in any action or other legal proceeding to enforce any award made by the arbitrators. The arbitrators may award attorneys fees to the prevailing party in any arbitration proceeding.
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> * * *
>
> . . . Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a

civil action of a summary nature where the relief sought is predicated on there being no dispute with respect to any fact.

In 2008, allegedly because of declining business and revenues, the partners began discussing restructuring of the firm, although they were unable to reach an agreement on how to accomplish the restructuring. On January 8, 2009, the Managing Partner, Keith Stark, proposed downsizing the firm by three attorneys, including partners. As noted by the majority:

> According to affidavits submitted by Hall and Ortner, Stark explained that their terminations were needed "to change the 'demographics' of the firm." The affidavits attested that defendant Joseph Ahern expressed that "the demographics of the firm was [sic] a problem because older attorneys lose their client bases," and that two younger attorneys "'had more potential' and their practices would be going up while ours would be going down." At the request of Hall and Ortner, the meeting adjourned until the next week. During the continued meeting on January 12, 2009, Ortner and Hall announced that the termination of their employment "constituted illegal age discrimination," and advised the other shareholders that they had retained legal counsel. On February 13, 2009, defendants Ahern and Jeffrey Fleury resigned as shareholders of Stark Reagan, effective immediately. The remaining shareholders voted to redeem the stock held by Hall and Ortner, terminating their employment effective March 1, 2009. [*Ante* at 2 (alteration in original).]

Plaintiffs commenced the instant action alleging violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. Defendants moved for summary disposition under MCR 2.116(C)(7), contending that the arbitration provision of the Shareholders' Agreement barred the lawsuit. Defendants also argued that plaintiffs, as shareholders, could not proceed on a claim under the CRA. The circuit court agreed with defendants that summary disposition was required under MCR 2.116(C)(7) and ordered the case to arbitration.

II. STANDARD OF REVIEW AND APPLICABLE LAW

The existence and enforceability of an arbitration agreement are questions of law that we review de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed to so submit." *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998), quoting *AT&T Technologies, Inc v Communications Workers of America*, 475 US 643, 648; 106 S Ct 1415; 89 L Ed 2d 648 (1986) (quotation marks omitted) (alteration in original). When the language of an arbitration clause is clear and unambiguous, the intent of the parties will be determined according to the plain meaning of the language. However, any ambiguity in the language of an arbitration clause is to be resolved in favor of arbitration:

> [C]onsistent with the strong federal policy promoting arbitration, any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT & T Technologies*,

> [475 US at 650.] In other words, there is a presumption of arbitrability "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Id*., quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). In [*First Options of Chicago, Inc v Kaplan*, 514 US 938, 945; 115 S Ct 1920; 131 L Ed 2d 985 (1985)], the Court explained that when the parties have a contract that provides for arbitration of some issues, "the parties likely gave at least some thought to the scope of arbitration." Therefore, the law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id*. [*Amtower*, 232 Mich App at 234-235 (third alteration in original).]

In order to determine whether a contested issue is subject to arbitration, we apply a three-part test: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *Detroit Auto Inter-Ins Exch v Reck*, 90 Mich App 286, 290; 282 NW2d 292 (1979). "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Huntington Woods v Ajax Paving Indus, Inc (After Remand)*, 196 Mich App 71, 75; 492 NW2d 463 (1992). And finally, "Segregating disputed issues 'into categories of "arbitrable sheep and judicially-triable goats"'" is generally disapproved. *In re Nestorovski Estate*, 283 Mich App 177, 202-203; 769 NW2d 720 (2009), quoting *Detroit Auto*, 90 Mich App at 289.

III. ANALYSIS

Plaintiffs maintain that the arbitration clause in the Shareholders' Agreement does not apply to their complaint arising under the CRA. I disagree. Pursuant to the three-part test previously set forth, the first and third elements are met: the agreement clearly has an arbitration clause and plaintiffs' claims are not expressly exempted by the terms of the agreement. The relevant question is whether plaintiffs' CRA claims are on their face or arguably within the Agreement's arbitration clause. I would conclude that they are.

The arbitration clause clearly and unambiguously declares that it applies to "[*a*]*ny* dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder . . . ." (Emphasis added.) The word "any" is defined as "'every; all.'" *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010), quoting *Random House Webster's College Dictionary* (1997). By its very terms, the agreement is also "subject to" and "governed by" Michigan laws.[2] Plaintiffs allege in their complaint that they were involuntarily terminated because of age discrimination. Because Michigan law prohibits

[2] "Subject" to means "[u]nder the power of authority of another; owing obedience or allegiance to another." *The American Heritage Dictionary of the English Language, New College Edition* (1981), p 1282. "Governed" by means controlled by the actions and behavior of another. *Id*. at 569.

discrimination against an employee on the basis of age, MCL 37.2202(1)(a), the arbitration clause in the agreement clearly applies. Moreover, engaging in illegal discrimination can hardly be said to be conducive to "the continuous, harmonious and effective management" of the firm which is a key purpose of the agreement.

Another issue addressed by the parties in the circuit court and on appeal is the status of the respective parties within the firm. Plaintiffs allege that they were employees and that defendants——the firm as well as its individual shareholders—were their employers. Without addressing the merits of plaintiffs' claims, it is clear that this argument will necessitate an examination of the agreement and operation of the firm in order to ascertain the status and rights of the individual shareholders. Plaintiffs' complaint is replete with references to "non-controlling" and "controlling" shareholders. Plaintiffs allege that the individual defendants had the "decisionmaking power" over "non-controlling shareholders" like plaintiffs. Plaintiffs effectively allege that there were "super partners" who made decisions that were "rubber stamped," while plaintiffs and others were relegated to an inferior position within the firm. These facts cannot be determined without reference to how the firm operated and the partners' relationships. The proceedings will necessarily include an examination of plaintiffs' status as shareholders and will, therefore, require a reading and application of the Shareholders' Agreement. The claim that plaintiffs were marginalized as shareholders directly affects their rights and responsibilities under the agreement. The agreement is critically important to the case—not just tangential to it; it is directly intertwined with plaintiffs' claims that they held a lesser interest in the corporation.

Plaintiffs take the position that, because they were fully indemnified of their capital contribution under the agreement and do not raise any claim regarding the *mechanics* of the stock divestiture, the agreement does not apply to what they believe is their separate and distinct claim of age discrimination. I disagree. Though the mechanics of divestiture may have been proper, plaintiffs are challenging the very process and motive that led to the determination to buy out their shares and divest them of their interest in the corporation. The majority opinion concedes as much by stating that plaintiffs have "filed a complaint against Stark Reagan and the individual defendants, asserting that age discrimination motivated defendants' decision to terminate [their] *shareholder status*." *Ante* at 1 (emphasis added).

There are two divesture provisions in the agreement applicable to this case. The first, § 8.1(A), concerns termination of employment:

> If a Shareholder who is employed by the Corporation ceases to be employed by the Corporation due to voluntary termination of employment, termination of employment by the mutual consent of the Shareholder and the Corporation, or termination by the unilateral act of the Corporation, such Shareholder shall be deemed to have offered to sell all of his Stock to the Corporation.

And the second, § 9.1, concerns shareholders who are forced out:

> Provided no other Triggering Event is then effective to cause a redemption or purchase hereunder, upon the vote or written consent of seventy-five percent

> (75%) of the voting power of the then total issued and outstanding Stock of the Corporation and delivery of written notice to such effect to all Shareholders, the Stock of a Shareholder which such vote or consent demands to be sold shall be subject to redemption by the Corporation . . . .

The agreement then sets out the procedural requirements for exercising a buyout, including price and terms. It is, as the majority notes, procedural in nature; however, that does not mean that it is inapplicable to plaintiffs' allegation of age discrimination. If found to be valid, their claim will undoubtedly include relief in the form of lost profits and stock ownership. Ultimately, plaintiffs are disputing whether defendants had the right to re-claim the shares.

Finally, because the arbitration clause was included in the agreement, the parties obviously gave some thought to the scope of any arbitration. It must be noted that the parties are not unsophisticated lay people; they are highly talented attorneys well versed in employment and contract law. As such, they were fully cognizant of all legal ramifications of the arbitration clause. The arbitration clause specifically refers to "any" dispute and does not exempt actions under the CRA as it does "civil action[s] of a summary nature where the relief sought is predicated on there being no dispute with respect to any fact." The law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter" and applying the presumption of arbitrability, it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers plaintiffs' complaint. *Amtower*, 232 Mich App at 235 (quotation marks and citation omitted) (alteration in original).

I do not take issue with the law cited by the majority; instead, I merely dispute the majority's application of these particular facts to the relevant law. Distilled to its essence, plaintiffs are contesting the involuntary redemption of shares, which was allegedly the result of unlawful discrimination. The Shareholders' Agreement is inextricably linked to plaintiffs' claims, which cannot be maintained without reference to the agreement. Plaintiffs' claims are, therefore, subject to arbitration. I would affirm the circuit court's order.

/s/ Kirsten Frank Kelly